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No. 73-1428

In the Supreme Court of the United States

OCTOBER TERM, 1973

PHYLLIS M. FENCL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

PHYLLIS M. FENCL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Phyllis M. Fencl, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not reported and is printed in the Appendix to this Petition (Appendix A).

QUESTION PRESENTED

When a taxpayer is interviewed by Special Agents of the Internal Revenue Service and after an unexplained hiatus of one year in the investigation is interviewed by a second set of agents, is the taxpayer entitled to be warned again before the second interview.

STATEMENT OF THE CASE

The original examination of the taxpayer's books and records and the original interview of the taxpayer was conducted by Revenue Agent Phelan on April 29, 1968. This meeting was held in response to a telephone call from Revenue Agent Phelan, to the taxpayer, requesting an appointment to examine and audit her records for the years 1966 and 1967 (Tr. M.S. 28-29).[1] The taxpayer turned over her sales records, expense ledger and bank statements, including cancelled checks and the Agent began his audit.

On the next day, April 30, 1968, he made a comparison between the deposits as reflected on the bank statements and the amount of gross receipts reported on Schedule C, and determined that the amount of deposits exceeded the amounts reflected on Schedule C. (Tr. M.S. 152). Although he denied that he came to the conclusion that there were indications of fraud present, his contemporaneous memorandum stated: "4-30-68 Audit of records continued.

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[1] References to (O.R. .....) are to the original record on appeal. References to (Tr. M.S. .....) are to the transcripts on the motion to suppress Volumes 1 and 2, February 7 and 8, 1973. References to (Tr. .....) are to the transcript of trial, Volumes 3, 4 and 5, February 23, 26 and 27, 1973. References to (D. Ex. .....) are to defendant's exhibits. The record has been transmitted to the Court by the Clerk of the Court of Appeals for the Seventh Circuit.

This agent also arrived at the conclusion that there were indications of fraud after running tapes of the bank deposits for 1966 and 1967" |D.Ex. 13 & 13a, Ex. Vol. 13-17). He questioned the taxpayer concerning the discrepancy and she stated that she didn't know what the difference was. (Tr. M.S. 159). She, in response to his questions stated that there may have been deposits which were not income, particularly interbank transfers. (Tr. 27). Before leaving he asked the taxpayer to make available her savings account passbooks and another checking account on May 2, 1968. (Tr. M.S. 161).

On May 2, 1968, after the taxpayer produced the requested records, Agent Phelan again questioned her about the differences in the bank deposits and the amount reported on Schedule C. She stated that she was trying to figure out where the amount of money came from. (Tr. 61). He told her that he was not satisfied with her answers. (Tr. M.S. 162), (Tr. 29). Agent Phelan told her that even considering the interbank transfers and loans, he could not reconcile the difference. He then asked her at least six times if she was reporting all her income, as he was dissatisfied with the answers that she gave him to account for the discrepancy (Tr. M.S. 179), (Tr. 31-32). The taxpayer then stated to him that she had destroyed sales tickets. In the words of Agent Phelan "She finally admitted that all sales were not reported in her sales journal nor on her 1966 and 1967 tax returns" (D. Ex. 13b. Ex. Vol. p. 18-20). The taxpayer told Phelan that she had destroyed sales receipts and not recorded them in her sales journal and did this to compensate for losses on sales items. (Tr. 33-34). Phelan then terminated his audit and did not retain any of the taxpayer's records.

On July 19, 1968, Revenue Agent Phelan and Special Agent Houlihan interviewed the taxpayer. Agent Houlihan testified that before proceeding with the interview, he advised the taxpayer of her rights, by reading a statement of her rights to her. He also testified that he told her that the duties of a Special Agent were to investigate possible criminal violations of the Internal Revenue Code. (Tr. M.S. 201) [2] When he told her of her right to remain silent she stated that there was no reason to remain silent since she had already told Agent Phelan what had happened. (Tr. M.S. 201). The taxpayer then told Agent Houlihan that she had destroyed sales tickets and that her sole reason for doing so was to affect her rent which was calculated on a basis relating to a percentage of sales. (Tr. M.S. 203). This explanation was the same as she had given to Agent Phelan. (Tr. M.S. 223). Special Agent Houlihan, in the company of another Special Agent met with the taxpayer again on July 24, 1968, and obtained from her sales slips for the entire year of 1966, sales slips for August through December of 1967, 3 cash receipts journals and credit receipts for 1967. They were returned to the taxpayer on August 2, 1968. On August 2, 1968, Special Agent Houlihan also obtained the taxpayer ledger of 1966 and 1967, which were returned the same day. (D.Ex. 1, 2, Ex. Vol. 7 & 8). According to the evidence, these were the only documents obtained by Houlihan from the taxpayer.

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[2] The taxpayer denied that Houlihan warned her of any rights during this or any other interview. She testified that the only thing that Houlihan told her was that she didn't have to answer questions, but she did since she had already told Agent Phelan, she would tell him (Tr. M.S. 45-47).

Special Agent Houlihan, because of assignment to other duties, had no further contact with the taxpayer. When he had originally entered the case it was for the purpose of a preliminary investigation, but it was changed to a "full-scale" investigation in September of 1968. (Tr. M.S. 206)

The taxpayer was not contacted again by the Internal Revenue Service until July of 1969. No explanation was given to the taxpayer during this hiatus. On July 16, 1969 she was interviewed by Special Agent Bell and Revenue Agent Ernst. Agent Bell testified, "I did not advise her of her rights because they were—she had been advised of those rights previously." (Tr. M.S. 271) Agent Bell had repeated interviews with the taxpayer from July 16, 1969 through May of 1970 and never warned her of her rights. (Tr. M.S. 261) The first time that any mention was made of a criminal investigation by Special Agent Bell was in a memorandum of a conversation with the taxpayer in July of 1970. (D. Ex. 25, Ex. Vol. 60) The defendant had received a letter from the Internal Revenue Service advising her that consideration was being given to the institution of criminal proceedings against her. (D. Ex. 12, Ex. Vol. p. 12) She then called Special Agent Bell and stated that she was not aware of criminal prosecution penalties. (D. Ex. 25, Ex. Vol. 60, Tr. M.S. 266, 267)

After his initial contact with the taxpayer on July 16, 1969 Bell interviewed the defendant on July 31, 1969, December 16, 1969, December 20, 1969, May 15, 1970 and June 18, 1970 (Tr. M.S. 274) She repeatedly asked when the tax would be determined so she could pay it. (Tr. M.S. 264, 265)

During these interviews and more particularly on July 31, 1969, December 30, 1969 and June 18, 1970, Special Agent Bell obtained records from the taxpayer relating to the years 1966 and 1967 and which were used by the Government in this prosecution. (D. Ex. 5, 6, 7, 9, 11; Ex. Vol. 5-11)

In addition to the documents obtained, Special Agent Bell also testified to many admissions made by the taxpayer during these interviews. Bell testified that on July 16, 1969 the defendant told him that she had withdrawn cash from the business for her personal use. (Tr. 180) On July 23, 1969, Bell testified that the defendant said that she couldn't guess how many sales slips she destroyed and that she did not report the dollar value that was on those sales slips. (Tr. 181) On July 31, 1969 the defendant denied having received any loans from relatives during the years 1965 through 1968. (Tr. 182) On December 16, 1969, the defendant told Special Agent Bell that she withdrew monies from the business for her personal use, and that she prepared her own sales tax returns during the indictment years, and the amounts on those returns corresponded to the amounts on the income tax returns. (Tr. 183-185) He also testified that he and the defendant went over her sales journals for the years 1966 and 1967 and that she told him that she would record the sales slip number in the book and the dollar amount of the sale next to that number. The defendant admitted to Special Agent Bell that she gave the figures on her return to the preparer (Tr. 193). During this conversation the defendant identified her returns and her signatures. He also testified that the defendant admitted that at the time that she filed her returns for 1966 and 1967 that she knew they were not correct (Tr. 196).

The defendant moved to suppress statements and documents which had been given to both Revenue Agents and Special Agents of the Internal Revenue Service during the course of the investigation (O.R. 3).

Hearing was held on the Motion to Suppress and after simultaneous memoranda, the Court in a memorandum opinion denied the motion to suppress (O.R. 9).

Trial was held before Judge Philip Tone and a jury and the defendant, who preserved her motion to suppress statements and documents delivered to the I.R.S., was found guilty on both counts (O.R. 13).

A timely motion for new trial was denied (O.R. 19) and the defendant sentenced to three years imprisonment, with the condition she serve the first ninety days in a jail type institution. The remainder of the sentence was suspended. She was placed on probation for two years and nine months. (O.R. 20).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE WARNINGS REQUIRED TO BE GIVEN TO TAXPAYERS DURING THE COURSE OF A CRIMINAL TAX INVESTIGATION.

In 1967 the Internal Revenue Service voluntarily took upon itself the obligation of giving taxpayers notice, before interrogation, that they were suspected of criminal tax fraud and the further obligation of giving full warnings before seeking incriminating statements. On October 3, 1967 the IRS issued instructions to all Special Agents of the Intelligence Division. These instructions were reported in IRS News Release No. 897, October 3, 1967, reprinted in 6 CCH Standard Federal Tax Report ¶5709.1148:

> In response to a number of inquiries the Internal Revenue Service described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations. Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.
>
> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons.

This News Release was a public statement of policy that had been required in the Service. This policy was expanded on April 26, 1968 (D.Ex. 17 and 18) to require agents to state, in addition to the fact that their duties as Special Agents was to investigate the possibility of *criminal violations* of the internal revenue laws to give the following warning.

"In connection with our investigation of your tax liability, I would like to ask you some questons. However, first I advise you that you have a right under the Fifth Amendment to the Constitution of the United States to refuse to answer any questions or to submit any information if you feel that such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any proceeding which may be undertaken by the United States. I advise you further that you may, if you wish, be represented by counsel."

The Courts have not hesitated to take the Internal Revenue Service at its word, and suppress evidence when its agents failed to comply with their own regulations.

In *United States* v. *Hefner,* 420 F.2d 809 (4th Cir. 1969) the court suppressed statements made under similar circumstances. Having previously given a statement to the IRS on February 19, 1967, the defendant Hefner was again invited to the IRS local office on November 30, 1967. He was advised that he was not required to furnish any information that might tend to incriminate him and that anything he said could be used against him. The agents failed, however, to advise Hefner that he could retain counsel or that he was the subject of a *criminal investigation.* Over his timely objection his statement given at this second interview was admitted into evidence at his trial, and he was convicted of wilfully furnishing to his employer false and misleading statements of federal income tax withholding exemptions. On appeal the 4th Circuit reversed the trial court for admitting Hefner's statements in the February interview. Since the IRS failed to follow its own announced instructions on the admonition a special agent must give to a taxpayer on his initial contact with him, none of the evidence obtained in violation of that instruction could be used by the Government.

> "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." *United States* v. *Hefner,* 420 F.2d 809, 811 (4th Cir. 1969).

Similarly, in *Leahey* special agents visited the defendant in her home after several initial visits by revenue agents.

> "Although they identified themselves, they failed to observe the IRS announced procedure of warning her that they were investigating the possibility of *crimi-*

> *nal* tax fraud. At a second visit when the agents obtained bank statements and books from (Alice Leahey) they also failed to give any warnings."
>
> *United States* v. *Leahey*, 434 F.2d 7 (1st Cir., 1970) (Emphasis supplied).

The defendant's motion to suppress the information and books and records obtained by the special agents on their two visits to her home was granted, and the 1st Circuit affirmed on appeal. The court held that the IRS "had a duty to conform to its procedure, that citizens have a right to rely on conformance, and that courts must enforce both the right and the duty." 434 F.2d 7, 11.

Moreover in reaching its decision the court considered and rejected the Government's argument that the *Accardi* doctrine of due process does not apply to investigative proceedings.

> "There can be no doubt that such investigations are subject to due process. As Mr. Justice Frankfurter said, speaking for the court in *McNabb* v. *United States*, 318 U.S. 332, 343 (1943), 'A democratic society, in which respect for the dignity of all man is central, naturally guards against the misuse of the law enforcement process.'" 434 F.2d 7, 9.

When Special Agent Bell entered the case, he was required by Internal Revenue Service rules and regulations to warn the taxpayer of her rights in the investigation. However, relying on the assumption that she had been warned by Special Agent Houlihan, a year prior to his interviews, Agent Bell did not re-warn the taxpayer.

No case has been found and this Court has not had occasion to consider a case which directly parallels the facts and the time sequence in this case. However, a discernible pattern has evolved from the reported cases dealing with the requirement to re-warn a suspect.

McGuire v. *United States,* 396 F.2d 327 (9th Cir. 1968) held without considering other possible factors, that when a valid warning was given *three days* before interrogation that there was no requirement to re-warn. *Miller* v. *United States,* 396 F.2d 492 (8th Cir. 1968) held that each case must rest on its special facts but where there was a *three hour* lapse between the warning and the interrogation, the examination was conducted by the same officers and the substance of the statement was the same that there was no necessity to re-warn. In *United States* v. *Hopkins,* 433 F.2d 1041 (5th Cir. 1970) the Court reached a similar result. However in reaching that result the court considered several factors:

(1) There was no delay between the original warning and the subsequent questioning, (2) the questions related to the same subject matter, (3) nothing was done by the second interrogator to dilute the first warning and (4) there was an uninterrupted series of events. The Court stated:

> The *Miranda* warnings, once given, are not to be accorded unlimited efficacy or perpetuity. There may be occasions where interrogation by one authority, be it state or federal is so disconnected with interrogation by the other as to compel a reiteration of the Miranda warnings. *United States* v. *Hopkins,* 433 F.2d 1041, 1045 (5th Cir. 1970)

Accord: *Brown* v. *State,* 6 Md. App. 564, 252 A.2d 272 (1969); *People* v. *Rosario,* 4 Ill. App. 3rd 642, 281 N.E.2d 714, 716 (1972).

In the case at bar, the four factors considered in *Hopkins* all require suppression of the documents and statements given to Special Agent Bell without warning. (1) There was a delay of a year in the questioning. (2) The

questions asked by Special Agent Bell and particularly those asked in interviews which occurred after July 28, 1969, were much more expansive than those asked by Special Agent Houlihan. (3) During the year's hiatus, the taxpayer thought that the matter was to be resolved by payment of tax and penalty and Special Agent Bell did nothing to disabuse her of this until she was notified in July of 1970 that her case was being considered for criminal prosecution. (4) The questioning was not the result of an uninterrupted series of events but proceeded intermittently during the last six months of 1969 and the first six months of 1970.

If the decisions of this Court interpreting the requirements of *Miranda,* see *Mathis* v. *United States,* 391 U.S. 1, as applied to tax investigations, are to have any effect, then the documents delivered to Special Agent Bell and the statements obtained by him should have been suppressed.

This case presents an appropriate vehicle for this Court to consider the requirement of warnings in criminal tax investigations and also to consider the duties to re-warn when there has been a hiatus in the investigation.

CONCLUSION

Wherefore, for the foregoing reasons the petitioner respectfully requests that the Court grant a writ of certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued December 7, 1973
January 28, 1974.

Before
Hon. Luther M. Swygert, Chief Judge
Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1536 vs.

PHYLLIS M. FENCL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
72 CR 83
Philip W. Tone, Judge

Defendant Phyllis M. Fencl appeals her jury conviction on two counts of income tax evasion. She claims error in the admission of statements and documents furnished to Internal Revenue Service ("I.R.S.") agents in alleged violation of I.R.S. regulations. We find no error, and we affirm the conviction.

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* Senior District Judge William J. Campbell, Northern District of Illinois is sitting by designation.

Fencl contends that Revenue Agent Phelan unduly prolonged his preliminary investigation after discovering indications of fraud, contrary to I.R.S. regulations. As a result, he gained admissions from Fencl to her deliberate understatement of income. Phelan began auditing Fencl's records on April 29, 1968. On the next day, he discovered that Fencl's bank deposits exceeded her reported gross income in 1966 and 1967. Fencl declared that the excess deposits reflected interbank transfers, which are non-income items. On May 2, Fencl supplied Phelan with additional bank records, but he was unable to account for the excess deposits. When asked about other possible non-income sources of deposits, Fencl then stated that some of the deposits represented loans. When Phelan was unable to substantiate loan deposits, he again asked Fencl if she had reported all of her income. Confronted with Phelan's inability to substantiate her version of the source of the deposits, Fencl declared that she had destroyed records of certain sales and had not reported this income.

I.R.S. rules in force at the time required a revenue agent to suspend his investigation on finding an indication of fraud. This necessitated a determination that (1) there was a substantial understatement of income (2) which was deliberate. On April 30, Phelan had merely determined that excess deposits existed. However, excess deposits, without more, cannot support a finding of understatement of income. *See, United States* v. *Lockyer,* 448 F.2d 417 (10th Cir. 1971). It was not until May 2, when Phelan had analyzed additional bank records to determine the extent of interbank transfers and had attempted to substantiate the amount of deposits representing loans, that Phelan could have determined the existence of a substantial understatement of income. After making that

determination, Phelan gave Fencl every opportunity to explain its occurrence. When Fencl stated that she had destroyed sales records and had not reported all of her income, Phelan promptly terminated the interview and returned Fencl's records. On this basis, we conclude that Phelan's conduct comported with I.R.S. regulations. Phelan's memorandum, which might be read to suggest that he found indications of fraud at an earlier date, is of little significance, for it was prepared five months after his investigation and, as the trial judge noted in denying a motion to suppress, erroneously equated an indication of fraud with a finding of excess deposits.

Fencl also argues that Special Agent Bell failed to apprise her of her rights to counsel and to silence, in violation of I.R.S. regulations, before commencing his investigation. As a consequence, he obtained damaging documents and admissions from her, which the prosecution subsequently used at trial. On July 19, 1968, the initial contact with Fencl after Phelan had referred the case to the I.R.S. Intelligence Division, Special Agent Houlihan advised Fencl of her rights to silence and to counsel and declared that he was investigating the possibility of a criminal violation of the tax laws, as prescribed by I.R.S. rules. The investigation proceeded until the fall of 1968, when, because of the priority of another investigation, the matter was set aside. On July 16, 1969, Special Agent Bell contacted Fencl, explaining that her case had been assigned from Special Agent Houlihan to him, that Revenue Agent Ernst was replacing Revenue Agent Phelan, and that, as Houlihan had previously told her, she could refuse to speak to the agents or could demand the presence of an attorney. The circumstances of this

case indicate that neither the ten month hiatus in the investigation nor the change in investigatory agents vitiated the effect of the warning. Bell plainly reminded Fencl of the warning which had previously been given to her, and he explained that the investigation was being continued with simply substitutions in I.R.S. personnel. Moreover, Bell's questioning related to the same subject matter which was the basis of Houlihan's investigation. *See, United States* v. *Hopkins,* 433 F.2d 1041 (5th Cir. 1970). In a similar context, this court held that suppression of evidence was not required where I.R.S. agents had warned the subject of a criminal tax investigation of his rights eighteen to twenty months prior to the examination of the subject's records by a second set of I.R.S. agents. *United States* v. *Mansfield,* 381 F.2d 961 (7th Cir. 1967), *cert. den.,* 389 U.S. 1015 (1967). Our resolution of that issue in *Mansfield* is dispositive of the question presented here.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 22, 1974.

Before
Hon. Luther M. Swygert, Chief Judge
Hon. Latham Castle, Sr. Circuit Judge
Hon. William J. Campbell, Sr. District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1536 vs.

PHYLLIS M. FENCL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn.
(72 CR 83)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.